

1988

Dorothy M. Bow v. Laura M. Marvin : Brief of Appellant

Utah Supreme Court

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Dexter L. Anderson; attorney for Laura M. Marvin.

Matt Biljanic; attorney for appellant.

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88-0027-

BRIEF OF APPELLANT

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FILED

FEB 27 1986

Clerk, Supreme Court Utah

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STATEMENT OF ISSUE PRESENTED ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN AWARDING
ATTORNEY'S FEES AND INVESTIGATIVE COSTS TO
GUARDIAN'S ATTORNEY IN OPPOSING TERMINATION
OF GUARDIANSHIP

STATEMENT OF FACTS

A. NATURE OF THE CASE.

Appellant filed a Petition For Removal Of Guardian in the Third District Court in and for Salt Lake County, State of Utah, on May 9, 1985 (R-98). No responsive pleadings filed.

B. DISPOSITION IN LOWER COURT

After a trial on July 22, 1984, the Lower Court granted the Petition For Removal Of Guardian and signed an Order terminating guardianship. (R-153). The Court, on October 9, 1985 entered an Order awarding attorney's fees and investigative costs to the Guardian's attorneys. (R-163) Objections to the fees and investigative costs were filed by Appellant on September 27, 1985 (R161) The objections were denied and the Order upheld December 2, 1985 (R-170) The Notice of Appeal was filed December 27, 1985. (R-172).

C. FACTS

On April 18, 1983, Laura M. Marvin was appointed guardian of the person of Dorothy M. Bow, (R-54) a physically incapacitated person and First Security Bank was appointed

conservator. (R-55).

On May 9, 1985, Dorothy M. Bow filed a Petition For Removal of Guardian. (R-98). No pleadings were filed by the Guardian through her attorney of record, Dexter L. Anderson. The trial was completed on July 22, 1985, (R-334) and no evidence was introduced by counsel for the Guardian supporting any claim for attorney's fees or investigative costs. Subsequently, on August 12, 1985, counsel for the Guardian filed a Petition for attorney's fees and investigative costs totalling \$ 3,372.15 (R132). The Court awarded fees and investigative costs over the objections of Petitioner - Appellant by an Order dated December 2, 1985. (R-170) Counsel, William F. Bannon, did not file an Appearance of Counsel for purposes of the record.

SUMMARY OF ARGUMENT

There is no factual or legal basis in the record of this case to support the District Court's award of \$3,372.15 attorney's fees, investigative costs and court costs.

The actions taken by the Guardian in opposing the Petition for Removal were not taken to protect the estate but rather to protect and continue her \$400.00 per month income. (R-301) Therefore, the Lower Court's Order awarding fees and costs should be reversed.

Since William J. Bannon failed to file an Appearance of Counsel and appeared as assistant counsel to Dexter L. Anderson, any fees due to him should be payable by Dexter L.

Anderson, not the Guardian's estate.

ARGUMENT

ISSUE

THERE IS NO LEGAL BASIS UPON WHICH TO
SUPPORT THE COURT'S AWARD OF ATTORNEY'S
FEES AND INVESTIGATIVE COSTS.

It is clear that Utah follows the American rule and allows attorney's fees only when there is a statutory or contractual basis for awarding them, as evidenced by the Utah Supreme Court's holdings in numerous cases. *Espinoza v. Safeco Title Insurance Co.*, 598 P.2d 346,348 (Utah 1979); *Ranch Homes, Inc. v. Greater Park City Corp.*, 592 P.2d 620, 625-26 (Utah 1979); *Mecham v. Benson* 590 P.2d 304, 309 (Utah 1979).

In this case, there is no contractual and no statutory basis for awarding fees and costs. The Guardian opposed the Petition for her removal because of her financial interest in having that relationship continue. (R-301). It is clear from the Guardian's own admissions (R-316 lines 24 and 25 and 316 lines 1-3) that she was actively deceiving the Appellant in her arrangement with the Conservator, whereby she received \$400.00 per month. It is important to note that Dorothy M. Bow was found physically not mentally incompetent. (R-40 paragraph 4). Yet, the Conservator and Guardian arranged without her knowledge for the \$400.00 payments. These payments began July 1, 1983,

together with other reimbursements, and continued until August, 1985. (R-71). Since the Guardianship was in fact terminated how then could the Lower Court justify its award of attorney's fees and costs?

If the Guardian in this case had expended attorney's fees and investigative costs in order to protect the estate one might justify the Lower Court's Order. However, where her actions were taken for her own self interests, as evidenced by her deceit in removing the accounting statements mailed to Dorothy M. Bow, one can hardly use that to support the Court's Order.

In support of Appellant's contention the following language in *In Re Smith's Estate*, 162 P.2d 105, 109 (1945) would appear to be controlling:

"No allowance may be made out of the estate for the services of an attorney not employed by the Personal Representative of the estate, where the services were rendered for the sole benefit of an individual or group of individuals interested in the estate."

Clearly, there is no evidence in the record to support any claim that the Guardian was protecting the estate by contesting her termination.

Even assuming there were some basis upon which to award attorney's fees and investigative fees, there was no evidence given during the trial to support the award. This is a sufficient basis upon which to reverse the Lower Court ruling, according to the following Utah cases. *Paul Mueller Co. v. Cache Valley Dairy Ass'n*, 657 P.2d 1279, 1287 (Utah 1982);

Freed Fin. Co. v. Stoker Motor Co., 537 P.2d 1039, 1040 (Utah 1975). Also see Cabrera v. Cottrell 694 P.2d P.624, where this court addressing the issue of attorney's fees held as follows:

"Second, a party who is entitled to attorney's fees and costs and fails to ask for all of them in the trial phase of the case or fails to adduce adequate evidence in support of a finding of reasonable attorney's fees, waives any right to claim those fees later."

Subsequent to the trial, Guardian's counsel filed Affidavits to support the claimed fees and costs. However, they fail to comply with the requirements of Thatcher v. Industrial Commission 207 P.2d 178 (1949). Not one of the six (6) factors outlined in the Thatcher case were dealt with by the claimant in those post-trial documents and the Court should have denied the claim.

CONCLUSION

There is no legal or factual basis in the records to support the Lower Court's ruling regarding attorney's fees and investigative costs.

The Lower Court's judgment granting attorney's fees and investigative costs to the Guardian's attorney constitutes error and should be reversed.

RESPECTFULLY SUBMITTED


MATT BILJANIC
Attorney for Petitioner

ADDENDUM

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AUG 29 1985

MATT BILJANIC A0323
Attorney for Dorothy M. Bow
7355 South 9th East
Midvale, Utah 84047
Phone: 255-3576

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

In the Matter of the : FINDINGS OF FACT AND CONCLUSIONS
Guardianship of : OF LAW
:
DOROTHY M. BOW : Probate No. P 83-127
: Judge David B. Dee

1001
The Petition for Removal of Guardian filed by Dorothy M. Bow came on for hearing before the above-entitled Court, the Honorable David B. Dee, Judge presiding, on the 22nd day of July, 1985 at the hour of 2:00 P.M. The Petitioner appeared in person and was represented by counsel, Matt Biljanic, and the Guardian, Laura M. Marvin, appeared with counsel, Dexter L. Anderson. The parties, together with witnesses, were sworn and testified concerning the issues before the Court and the same having been submitted to the Court for determination and the Court being fully advised in the premises and good cause appearing,

The Court now makes and enters the following:

FINDINGS OF FACT

1. That the Petitioner does not want Laura Marvin to act as guardian of her person.

The Court now makes and enters the following:

CONCLUSIONS OF LAW

1. That Laura Marvin is hereby removed as the guardian of the person, Dorothy Bow.

DATED this 22 day of August, 1985.

BY THE COURT:

ATTEST
H. DIXON HINDIE
CLERK

[Signature] By [Signature]
JUDGE Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to William E. Bannon, Attorney at Law, Sixth Floor, Boston Building, Exchange Place, Salt Lake City, Utah 84111, and to Dexter L. Anderson, Attorney for Laura M. Marvin, S.R. Box 52, Fillmore, Utah 84631, postage prepaid, this 14th day of August, 1985.

[Signature]
MATT BILJANIC

MATT BILJANIC A0323
Attorney for Dorothy M. Bow
7355 South 9th East
Midvale, Utah 84047
Phone: 255-3576

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

In the Matter of the : ORDER TERMINATING GUARDIANSHIP
Guardianship of :
DOROTHY M. BOW : Probate No. P 83-127
: Judge David B. Dee

The Petition for Removal of Guardian filed by Dorothy M. Bow came on for hearing before the above-entitled Court, the Honorable David B. Dee, Judge presiding, on the 22nd day of July, 1985, at the hour of 2:00 P M. The Petitioner appeared in person and was represented by counsel, Matt Biljanic, and the Guardian, Laura M. Martin, appeared with counsel, Dexter L. Anderson. The parties together with witnesses were sworn and testified concerning the issues before the Court and the same having been submitted to the Court for determination and the Court being fully advised in the premises and good cause appearing.

The Court now having entered its Findings of Fact and Conclusions of Law, and the Court being fully advised in the premises and good cause appearing, now on Motion of Matt Biljanic, Attorney for Petitioner,

IT IS HEREBY ORDERED as follows:

1. Laura M. Marvin is hereby terminated as guardian of the person of Dorothy M. Bow.

DATED this 22 day of Aug, 1985.

BY THE COURT:


JUDGE

ATTEST
DIXON HINDLEY
CLERK

Deputy Clerk

SEP 6 1985

[Signature]
Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the
Guardianship of

:

MEMORANDUM DECISION

:

DOROTHY M. BOW

PROBATE NO. P 83-127

The above matter came on before this court for trial on the Petition of the incapacitated person for removal of Laura M. Marvin as her guardian.

The court after listening to argument of counsel and testimony of witnesses now makes and enters its Memorandum Decision as follows.

The initial filing in this matter indicates a petition for the guardianship of Dorothy M. Bow, an incompetent person. This document filed February 10, 1983 was then argued to the court and some where along the line the court determined that Mrs. Bow was an incapacitated person not an incompetent person. Whether or not this determination was made because of direct information received by the court or whether this information came to the file as a result of inadvertent mistake on the part of counsel preparing the documents this court does not know. But in any event a determination was made by this court that said Laura M. Marvin should be removed as the guardian of the incapacitated Dorothy M. Bow.

The initial petition for the removal of Laura Marvin requested the appointment of another individual to act for said Dorothy Bow and on that basis counsel for the initial guardian felt that they needed to protect Dorothy Bow as well as their client Mrs. Marvin and conducted extensive investigation and attended several hearings and presented witnesses to that end.

Heretofore, the attorney for Mrs. Bow has applied for and was granted attorney's fees as appearing for what appeared to be a friend of court in terms of the earlier hearing starting in 1983.

This court now finds on the question of attorney's fees that the attorneys representing Laura Marvin and in that regard as they thought, Mrs. Bow, should be entitled to the attorney's fees prayed for and the court so orders.

Mr. Bannen is requested to prepare the appropriate documents not inconsistent with this Memorandum Decision.

Dated this 5 day of September, 1985.


DAVID B. DEFURIA
DISTRICT JUDGE

FILED IN CLERK'S OFFICE

SALT LAKE COUNTY

H. Dixon Higgins, Clerk

By

William F. Bannon #3698
FRONG & HANNI
Attorneys for Laura M. Marvin
15th Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

In the Matter of the

Guardianship of

DOROTHY M. BOW

)
)
)
)
)

ORDER

Probate No. P83-127

Honorable David B. Dee

The guardian's Motion for Award of Attorneys Fees having been regularly brought before the courts and the guardian appearing by and through her attorneys of record Dexter Anderson and William F. Bannon and the incapacitated person represented by her attorney Matthew Biljanic and the court having heard arguments of counsel with regard to said Motion and the court finding that the initial Petition for removal of the guardian also sought appointment of another individual as the guardian and that the guardian felt a need to protect Dorothy Bow through investigation, hearings and presentation of witnesses and it further appearing to the court that the attorney for Mrs. Bow previously applied for and was granted attorney's fees for appearing as a friend of the court in this matter and other good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the former guardian, Laura M. Marvin, is hereby awarded the following amount to be paid out of the Estate of the incapacitated person:

1. Two Thousand One Hundred Nineteen Dollars investigation costs.
2. Seven Hundred Fifty Dollars attorney's fees for Dexter

L. Anderson.

3. Four Hundred Twenty Dollars attorney's fees for William F. Bannon.


4. Eighty Three Dollars and Fifteen Cents allowable costs of court.

DATED this 9 day of September, 1985.

BY THE COURT:

ATTEST
J. GORDON HINDLEY
CLERK

Deputy Clerk

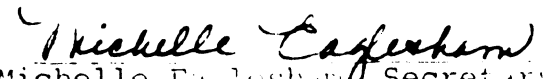

Honorable David B. Dee,
District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and foregoing was mailed, postage prepaid, this 24th day of September, 1985, to:

Matt Biljanic
Attorney for Dorothy M. Bow
7355 South 9th East
Midvale, Utah 84047

Dexter L. Anderson
Attorney at Law
S.R. Box 52
Fillmore, Utah 84631


Michelle English, Secretary

DEXTER L. ANDERSON
Attorney for LAURA M. MARVIN
S. R. Box 52
Fillmore, UT 84631
Telephone (801) 743-6522

FILED IN CLERK'S
Salt Lake

AUG 12 1985

H. Dixon
By *[Signature]* Clerk

IN THE DISTRICT COURT, PROBATE DIVISION
SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the)	PETITION FOR ORDER AUTHO-
Conservatorship of:)	RIZING PAYMENT OF ATTORNEY
)	FEES AND EXPENSES.
DOROTHY M. BOW.)	Probate No. P-83-127
)	

COMES NOW LAURA M. MARVIN, Post Guardian of the above incapacitated person, and moves the Court for an Order authorizing the Conservator in the above-entitled matter to pay the following attorney fees and expenses incurred in the above-entitled matter, and represents to the Court as follows:

1) DOROTHY BOW, through her attorney, petitioned the Court for an Order removing LAURA M. MARVIN as Guardian of the person of DOROTHY BOW.

2) Said Petition required the Petitioner LAURA M. MARVIN to prepare to meet the allegations of the Petition.

3) In the course of investigating the matter, LAURA M. MARVIN became convinced that the Petition filed in DOROTHY BOW's behalf was forged and that JOSEPH ROSNER, the "would be" guardian and others were attempting to take advantage of DOROTHY BOW's property and assets.

4) LAURA M. MARVIN firmly believed that the Petition to remove her as Guardian had to be investigated and litigated in order to bring all the facts to the Court's attention, all in the interest and welfare of the person of DOROTHY BOW.

5) Petitioner incurred the following expenses herein in good faith in her capacity as Guardian of DOROTHY M. BOW, and in her interest and welfare:

a) Investigator fees including handwriting examination and testimony of J. D. BERGEN in Court (as per attached statement) \$ 2,119.00

b) Co-counsel fees, WILLIAM J. BANNON, Attorney at Law (as per attached statement) \$

c) Attorney fees, DEXTER L. ANDERSON, Attorney for Guardian (as per attached statement) \$ 750.00

d) Witness fees _____

WHEREFORE, Petitioner requests that the Court authorize and order the Conservator of DOROTHY M. BOW to pay the above cost and expenses incurred by LAURA M. MARVIN in her capacity as Guardian of DOROTHY M. BOW.

DATED this 12th day of August, 1985.

X

LAURA M. MARVIN, Petitioner

STATE OF UTAH)
) ss.
COUNTY OF MILLARD)

I, LAURA M. MARVIN, being first duly sworn, depose and say that I am the Petitioner herein, that I have read the foregoing Petition, and the same is true and correct.

X

LAURA M. MARVIN

SUBSCRIBED AND SWORN TO before me this _____ day of August, 1985.

Wm. W. Johnson
NOTARY PUBLIC
Residing at Fillmore, UT

My Commission Expires:
6/16/86

CERTIFICATE OF MAILING

This is to certify that I caused to be mailed four true and correct copies of the foregoing, Brief of Appellant, Dorothy M. Bow, postage prepaid, this 25th day of February, 1986, to

Dexter L. Anderson
S.R. Box 52
Fillmore, Utah 84631
Attorney for Laura M. Marvin


MATT BILJANIC